

ITAT remanded matter to determine nature of payments made by assessee to NR entities

Summary – The Chennai ITAT in a recent case of Changepond Technologies (P.) Ltd., (the Assessee) held that In view of assessee's failure to being on record copy of agreement entered into with non-resident entities, it was not possible to determine nature of payments made to those entities and, thus, matter was to be remanded back for disposal afresh

Facts

- The assessee was engaged in business of software development. During relevant year, assessee made payments to non-resident parties towards business development expenses. The assessee's case was that payments were made towards commission and consultancy charges to foreign branches of Indian company which did not have PEs in India. It was further submitted that payments were made for services rendered outside India and, thus, same were not liable to tax in India.
- The Assessing Officer rejected assessee's explanation. He was of the view that payments in question were in the nature of fee for technical services taxable in India. Since assessee failed to deduct tax at source under section 195 while making said payments, the Assessing Officer disallowed same under section 40(a)(i).
- The Commissioner (Appeals), however, deleted the disallowance made by Assessing Officer.
- On revenue's appeal:

Held

- Admittedly, the assessee is engaged in the business of software development. In the profit and loss account, the assessee has debited and claimed to have incurred the expenses towards business development in USA and UK. The Assessing Officer has observed that the assessee has not deducted TDS as required under section 195. Before the Assessing Officer the assessee has contended that the payments are made for service rendered outside India by foreign branch of an Indian company. Further, it was submitted that no part of income accrues in India; no tax is deductible in India. However, the assessee has not filed any agreement entered into between the assessee and foreign agent. Further, the Assessing Officer has observed from the invoices filed by the assessee that the services rendered are of consultancy and technical in nature.
- It is not clear from the submissions of the assessee as to whether the payment made to non-resident has permanent establishment in India or not since the assessee has made two contrary submissions before the Assessing Officer that "the payments are made for service rendered outside India by foreign branch of an Indian company" as well as "the recipient has no Permanent Establishment in India". Before the Commissioner (Appeals) or before the Tribunal, the assessee has not filed any agreement having entered into between the assessee and the foreign agent. However,

before the Commissioner (Appeals), the assessee has claimed to have incurred the expenses towards commission and consultancy charges paid to non-residents of USA and UK, without any concrete evidence. Without any agreement, no assessee can utilize any sort of services outside India with non-residents.

- In the absence of agreement entered into between the assessee and non-resident, it is not possible to conclude as to whether the payment made by the assessee was for commission purpose or the services offered to the assessee were consultancy and technical in nature and moreover, the non-resident has Permanent Establishment in India or not. Under these facts and circumstances, the order of the Commissioner (Appeals) is set aside and the matter is remitted back to the file of the Assessing Officer with a direction to the assessee to furnish all relevant details with regard to the agreement having entered into for the services utilized in a business carried on outside India and thereafter, the Assessing Officer is directed to verify the same and decide the issue in accordance with law.